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Outside Counsel

Sealing a Leaky Domestic Relations Law 235

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To the great relief of many people in the financial industry, the recent matrimonial case of *Kelly v. Kelly* was settled. A short blurb appeared in the New York Post announcing that fact together with a reference to undisclosed terms of the settlement. Christina Kelly, in response to an application by her husband Sage Kelly for custody of their children, had submitted an affidavit alleging that her husband had induced her to partake in drug-fueled parties and sexual escapades with various cohorts and clients of the husband's investment banking firm. Ms. Kelly also filed a parallel tort action for damages arising from her "he made me do it" defense to allegations in the custody action that she was an unfit parent.

Annexed as an exhibit to the electronically filed tort complaint was Ms. Kelly's fact-filled affidavit in the matrimonial proceeding. Available online, it became a worldwide media sensation. As a consequence of the publication of these private matrimonial facts, Mr. Kelly was forced (at least temporarily) to withdraw from his firm.

Section 235 of the Domestic Relations Law was designed to provide that embarrassing personal details, which are frequently a part of matrimonial matters but are of minimal public concern, generally not be subject to media publicity. It directs that the clerk of the court seal all matrimonial files with access only allowed to the parties and their counsel.[1] Interestingly, the parties may still give copies of the papers to whomever they wish, and they can use them in other litigations, such as a plenary action to enforce the prior divorce decree, which are not sealed.[2]

Section 235, however, comes into conflict with the First and Sixth Amendments to the U.S. Constitution and Article 1, section 8 of the Constitution of the State of New York which have been interpreted to mandate public and open court proceedings. So, while DRL 235 seals the files and Judiciary Law §4 allows the court to exclude the public from divorce court proceedings, the courts refuse to close courts merely because litigants want their cases to remain private.[3] The result has been the incongruous juxtaposition of sealed files and open trials in the same case.

A litigant who has previously relied on DRL 235 to keep his case private may therefore want to

think twice about going to trial where the courtroom might be filled with members of the press.

Possible Scenarios

Ms. Kelly skirted the DRL 235 rule when, as required by NYCRR §202.5-bb, NY New York County E-Filing Doc. 1, her lawyer filed the tort action on the New York State Courts Electronic Filing System (NYSCEF), which happens to be available and open to any person with Internet access.[4] Very quickly, the act of filing the affidavit resulted in a catastrophic public relations disaster at least for Mr. Kelly and his firm.

Another way that DRL 235 protected material can be de facto unsealed is in the written decisions made by the court in the actions themselves. To understand the nature of contents of many of these decisions, under the rules, parties to matrimonial litigations must file extensive financial affidavits outlining details of their assets and liabilities and copies of tax returns. Domestic Relations Law 236 mandates that the judges explain in their decisions how each of the statutory factors enumerated played a role in reaching the judge's conclusion. The result is that matrimonial decisions on alimony, equitable distribution and child support are chock full of interesting detail. If that decision is published, Internet aggregators and search engines disseminate that decision to whomever might decide to Google or otherwise search the name of a party, a child, or a company.

In one recent case brought by motion in a prior matrimonial action (i.e., one covered by section DRL 235), the parties disputed a clause written into a previously signed separation agreement. The judge wrote a 12-page decision directing that certain aspects of the case should proceed to a hearing. Both parties desired to keep their matter private and reached a compromise solution prior to that hearing, and the matter seemed to go away with very little risk of exposure of the private details to the wider public. However, the judge submitted the decision un-redacted for publication.

The New York Law Journal published the decision, using only the initials of the parties. Google and other search engines found little of interest in the initials, and the decision died a silent death. However, when the decision was subsequently published by the New York State Law Reports, the full names of the parties were used. Immediately, a Google search of either party or of their daughter (whose real name was also published) or of the husband's company led directly to the decision which among other things revealed the exact terms of the financial settlement including the agreed value of a privately held company. Furthermore, bank account names and numbers were published. What the parties had thought was a totally private settlement, both initially when they signed a separation agreement, and subsequently when they settled their litigation, was now a matter of public record. Even a Google search of the 15-year-old daughter's name lists the decision as the first item, so that her peers now have access to the most private financial information of her family.

New Rule and Guidelines

A. Gail Prudenti, the chief administrative judge, announced on Nov. 14, 2014, that the courts were adopting guidelines for redacting personal identifying information from civil filings in Supreme and County courts. The new 22 NYCRR 202.5(e) captures the spirit of protecting privacy, but unfortunately specifically excludes matrimonial cases. The NYLJ article, "OCA Orders Redactions in Court Filings to Curb Identity Theft," specifically cited the importance of

protecting litigants from "identity thieves." Matrimonial litigants remain a logical target.

It is time that we expand the protection of parties' privacy in matrimonial actions beyond the duty of the clerks to seal the files. It is impossible to get divorced without commencing a court proceeding. Since only a judge can pronounce a divorce and the rules require extensive financial disclosure, the court should also undertake to preserve the privacy of that material.

Judges must be more aware of the effect of their written decisions particularly in this Internet age. However, rather than leave the issue to individual judges, a rule in matrimonial actions should be adopted akin to Rule 202.5(e) providing that all decisions must change or redact: the parties' names, addresses, Social Security numbers, bank account details, names of their places of employment, names of their children and any other private information which is potentially damaging to the family, unless there is a particular public interest in the particular parties which justifies not doing so.

A perfect example of how this can be done without any loss of integrity to the significance of the decision is Judge Linda Christopher's 60-page ruling in *SH v. EH*, NYLJ 1202676582939, at *I (Sup. Ct., Westchester Co., Decided Oct. 24, 2014) where the names of the parties, the children, the husband's past and present employers, and the town in which they lived were all redacted.

The public policy underlying Section 235 of the Domestic Relations Law only does part of the job leaving more to be done to protect the privacy of matrimonial litigants in the digital age. Francis Wellman in his seminal book "The Art Of Cross-Examination"[5] wrote that you mustn't just lay the top on the coffin, but you must make sure you nail it shut. We should also nail shut the confidentiality of the parties' private information in matrimonial cases.

Endnotes:

1. Conceptually, the sealing is to last for 100 years. See *Madsen v. Westchester County Clerk*, 4212/2013 NYLJ 1202653116525, at *1 (Sup. Ct. Westchester County, April 22, 2014) (denying petitioner's motion to access filings of 1925 divorce action for purposes of writing a biographical work about the husband).

2. However, a publication of that material if it is defamatory is actionable. *Danziger v. Hearst Corporation* 304 N.Y. 244, 107 N.E.2d 62. (1952).

3. See for example, *Merrick v. Merrick*, 154 Misc.2d 559, 585 N.Y.S.2d 989 (Sup. Ct. N.Y. Co., 1992), affirmed, 190 A.D.2d, 593 N.Y.S.2d 192 (1st Dept. 1993) (denying wife's motion to close the courtroom because her emotional response to media coverage of the action was insufficient to overcome the policy in favor of public access to the court, but noting that the case was sealed under DRL §235).

4. NY New York County E-Filing Doc. 1 provides in pertinent part: "E-filing is mandatory in all cases commenced in the court on and after Feb. 19, 2013 (except for Art. 78, election law, matrimonial, and Mental Hygiene Law matters). Such cases must be commenced electronically and initiating documents will not be accepted in hard copy form."

5. Wellman, Francis L., "The Art of Cross-Examination." London: Macmillan & Co., Ltd., 1903. (accessible on Google Books).